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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No.

EPOCH PRODUCING CORPORATION,

Petitioner,

vs.

KILLIAM SHOWS, INC., GREGSTAN ENTERPRISES, INC., PAUL KILLIAM, MOVIELAB, INC.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement of the Case

In 1914, D. W. Griffith produced and directed THE BIRTH OF A NATION. According to the only witnesses to the making

of THE BIRTH OF A NATION who testified at the trial of this case, Griffith was personally responsible for every aspect of the creation of the motion picture, including the preparation of the scenario, the designing of the sets, the day-to-day creation of the script during filming, and the direction of the performers (JA 246A, 258A).[1]

Copyright registration in THE BIRTH OF A NATION as an unpublished work was applied for by the David W. Griffith Corporation ("DWG Corp."), a corporation dominated by D. W. Griffith. The application and certificate of copyright registration identified D. W. Griffith as producer and author of the motion picture (E 12, 13).[2] Statutory copyright in the motion picture as a published work was also obtained by the DWG Corp. for the initial 28-year term through publication with notice of copyright in its name on February 8, 1915 (E 14).

Subsequently, the DWG Corp. executed two assignments of its interest in the initial term of copyright in the motion picture to the Petitioner, Epoch Producing Corporation ("Epoch") and Thomas Dixon, the author of the novel on which THE BIRTH OF A NATION was based. Epoch and Dixon then applied for and obtained copyright registration, valid for the duration of the initial term of copyright in THE BIRTH OF A NATION, which would expire February 7, 1943 (E 10, 11). No mention of the

1. References to "JA" refer to the two volume Joint Appendix containing the transcript of proceedings in the District Court.

2. References to "E" refer to pages in the Exhibit Volume containing documents offered in evidence during the course of proceedings in the District Court. Frank Woods, identified as co-author in the certificate of copyright registration (E 13), was "second in command" to D. W. Griffith (JA 259A).

Majestic Motion Picture Company ("Majestic") appears in the above-mentioned assignments, in the applications for copyright registration made either by the DWG Corp. or by Epoch and Dixon, or in the certificates issued pursuant thereto.

In 1942, Epoch applied for renewal copyright in the motion picture, and obtained a certificate of registration of its renewal application (E 21, 22). On May 22, 1969, Epoch filed a complaint against Respondents, alleging that Respondents had infringed its renewal copyright in THE BIRTH OF A NATION. The jury found that Respondents had infringed Epoch's renewal copyright. Respondents appealed from the judgment entered on that verdict, arguing *inter alia* that the District Court erred in failing to direct a verdict in favor of Respondents, on the ground that Epoch had not established the validity of its renewal copyright.[3]

The Court of Appeals found, upon examination of the entire record, that Epoch had not offered evidence from which it could reasonably be concluded that Epoch had been entitled to claim the renewal copyright in THE BIRTH OF A NATION. Accordingly, the Court of Appeals found it unnecessary to consider other errors of the District Court cited by Respondents on appeal, and directed the District Court to dismiss Epoch's complaint against Respondents. It is this decision of the Court of Appeals which Epoch seeks to have reviewed by this Court on certiorari.

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3. Respondents conceded at trial and during their appeal that Epoch had acquired a valid initial-term copyright in the motion picture. Respondents contested only the validity of Epoch's claim of entitlement to the renewal term of copyright.

Reasons for Denying the Writ

Petitioner's brief is devoid of any "special and important reasons" which merit the review by this Court of the unanimous decision of the Court of Appeals for the Second Circuit.[4] See *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) (Frankfurter, J., on petition for rehearing). Petitioner's first contention, that it was deprived of its Seventh Amendment right to a jury trial, presents no unresolved issue of public importance, and moreoever is not substantiated by the record of this case.[5] The standard according to which a federal district court or court of appeals should order that a verdict be directed is well established. It is the obligation of a court to direct a verdict as a matter of law in the absence of evidence sufficient to place an essential issue of fact in dispute. See *Galloway v. United States*, 319 U.S. 372, *rehearing denied*, 320 U.S. 214 (1943); see also *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943). It is clear that this principle was correctly applied by the Court of Appeals in the instant case.

The other issue Petitioner urges this Court to consider on review is that the Court of Appeals erred in stating that certificates of copyright renewal are not entitled to the *prima facie* evidentiary value afforded certificates of initial-term copyright registration under 17 U.S.C. §209.[6] This claim also

4. Rule 19 of the Supreme Court Rules.

5. Petitioner raises this issue in numbers 1 and 4 of its "Questions Presented" (Petition at 2-3). In both numbered issues, a claim of deprivation of Fifth Amendment rights is also set forth. Although the form of presentation of numbers 1 and 4 differs somewhat, the legal claim in each appears identical.

6. Petitioner states this issue in numbers 2 and 3 of its "Questions Presented" (Petition at 2-3). Again, although set out in somewhat different form, each raises the same claim.

lacks the significance required to justify review by this Court on certiorari. Not only did the existence of evidence rebutting the validity of Petitioner's renewal certificate render this issue inessential to the decision of the Court of Appeals, 522 F.2d at 746, but the Court was correct. 17 U.S.C. §209 refers only to certificates of inital-term copyright registration. Moreover, the construction adopted by the Court of Appeals creates no difficulties for the holders of valid renewal copyrights, nor does it interfere with the administration of the copyright law.

I.

PETITIONER'S CONTENTION THAT THE COURT OF APPEALS VIOLATED ITS SEVENTH AMENDMENT RIGHT TO A JURY TRIAL PRESENTS NO ISSUE FOR THIS COURT TO REVIEW ON CERTIORARI.

A. The Court of Appeals Applied the Correct Legal Standard in Ordering that a Verdict Should Have Been Directed for Respondents at Trial.

The Court of Appeals in the present case carefully applied the standard governing directed verdicts set out by this Court in *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943), and determined that the evidence presented at the trial permitted but one reasonable conclusion, and that a verdict should have been directed in favor of Respondents. 522 F.2d at 744. That standard has since been adopted and applied by all federal courts, see 5A *Moore's Federal Practice*, ¶50.02[1] at 2321 (1974), and

Petitioner does not even suggest that it should be reexamined by this Court.[7]

B. The Evidence at Trial Did Not Permit the Inference that Petitioner was Entitled to the Renewal Copyright.

Despite its efforts to reargue the entire case, Petitioner fails to demonstrate that the Court of Appeals erred in applying the accepted standard for a directed verdict to the evidence produced at trial. That evidence, and the application of governing law to it, warrants no conclusion other than that reached by the Court of Appeals. 522 F.2d at 743-48. Petitioner contends that evidence existed at trial from which the jury could reasonably have concluded that it obtained the right to claim the renewal copyright in THE BIRTH OF A NATION from

7. Petitioner cites a number of cases in which this Court has found that an appellate court improperly directed a verdict, contrary to prior jury determination, in support of its contention that the present case should be reviewed on certiorari. Most of those cases arose initially under the Jones Act or the Federal Employers' Liability Act, *see, e.g., Basham v. Pennsylvania R.R. Co.*, 372 U.S. 699 (1963); *Gallick v. B.&O. R.R. Co.*, 372 U.S. 108 (1963); *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500 (1957); *Schulz v. Pennsylvania R.R. Co.*, 350 U.S. 523 (1956); *Lavender v. Kurn*, 327 U.S. 645 (1945); *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29 (1944); *Jacob v. New York City*, 315 U.S. 752 (1942), and reflect a special supervisory role assumed periodically by this Court to assure uniform application of federal law in cases brought under these acts. *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943). Other cases cited by Petitioner in which federal courts of appeals were found to have improperly overruled jury verdicts were reviewed by this Court for reasons unrelated to any Seventh Amendment claim. *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1961) (certiorari granted to review "important questions under the antitrust laws"); *Halliday v. United States*, 315 U.S. 94, 96 (1942) (certiorari granted to determine circumstances under which courts of appeals must order new trials under Rule 50(b) of Federal Rules of Civil Procedure); *Kaufman v. Tredway*, 195 U.S. 271, 274 (1904) (certiorari granted to define preferences under Section 60 of Bankruptcy Act).

Majestic or the DWG Corp., or by combining "whatever rights Majestic and the Griffith Corporation held . . ." (Petition at 6). Petitioner neglects to state that, as a matter of copyright law, an individual author retains the right to claim renewal in a copyrighted work, absent a specific assignment of rights to the renewal term. *Fred Fisher Music Co., Inc. v. M. Witmark and Sons,* 318 U.S. 643 (1943). As the Court of Appeals' decision makes clear, to conclude that D. W. Griffith was other than the individual author of THE BIRTH OF A NATION requires speculation which flies in the face of evidence available at trial. This being the case, it was the responsibility of the Court to direct a verdict accordingly. "By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." *Brady v. Southern Ry. Co.,* 320 U.S. 476, 480 (1943).

Uncontradicted evidence offered by Respondents at trial demonstrated clearly that D. W. Griffith was the author of the motion picture, maintaining complete artistic control over its production.[8] The Court of Appeals was correct in finding that no evidence justified an inference that Griffith had been employed by Majestic to create THE BIRTH OF A NATION. Giving Petitioner "the benefit of every doubt," 522 F.2d at 744, as did the Court of Appeals, there was no evidence indicating Majestic had hired Griffith to produce the motion picture, or had exercised the supervision and control over its production

8. Testimony of Lillian Gish and Joseph Henabery (JA 244-264A). Moreover, the certificate of original copyright registration, and application therefor, identified D. W. Griffith as the author of the motion picture (E 12, 13).

required to establish an employment-for-hire relationship. 522 F.2d at 744.[9]

The Court of Appeals was also correct in concluding from the evidence that the entitlement of the DWG Corp. to claim the initial-term copyright in the motion picture could only have derived from the personal rights of D. W. Griffith. 522 F.2d at 747, n. 8. Uncontradicted evidence, in the form of federal and state tax returns (E 46-50 & 55-57) showed that the DWG Corp. was a totally inactive entity in 1914, the year in which THE BIRTH OF A NATION was produced, and almost totally inactive in 1915, the year of the motion picture's first release. This evidence precludes the inference that the corporation could have been the employer of anyone during this period. To argue that the DWG Corp. was the employer responsible for the production of the motion picture, as does Petitioner (Petition at 13), is truly to urge that speculation be accepted in place of evidence.

In contending that recognition of D. W. Griffith as author of THE BIRTH OF A NATION, when copyright was first secured in the name of the DWG Corp., constitutes an

9. Petitioner's contention that a letter from Majestic to Epoch dated March 2, 1915 (E 61) provides evidence of Majestic's role in the production of the motion picture offers no proof that Majestic employed D. W. Griffith to make the motion picture. Moreover, the letter was properly excluded from evidence at the trial, because it was an unexecuted copy of a document the original of which was not produced. The letter had not been identified in the Pretrial Order, and therefore was not entitled to the presumption of authenticity afforded to documents therein mentioned (JA 58A). Petitioner did not even protest the exclusion of the letter at trial, conceding that it was not "a vital thing" (JA 74-1A). The letter, in any case, provides no evidence that Majestic was anything more than a financial backer of the motion picture production. As much was conceded, *arguendo*, by the Court of Appeals in its assessment of the evidence. 522 F.2d at 744.

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unjustified piercing of the corporate veil, Petitioner overlooks the applicable principles of copyright law. The rule limiting the liability of individual stockholders, absent fraud, for corporate obligations has no bearing on the instant case. In assessing the evidence as to the relationship of D. W. Griffith and the DWG Corp., the Court of Appeals correctly acknowledged that the individual author of a copyrightable work may choose to secure copyright in a corporate name, while retaining the right to claim the renewal copyright personally.[10] The Court reached the only conclusion that could have been drawn from the evidence produced at trial: that D. W. Griffith was the author of the motion picture, and that the DWG Corp. obtained the initial 28-year term of copyright as the assignee of D. W. Griffith's personal, common-law rights. 522 F.2d at 747.

In the light of this conclusion, the Court of Appeals considered the effect of the two assignments of copyright in THE BIRTH OF A NATION made by the DWG Corp. 522 F.2d at 746-47. The first of these assignments (E 16) makes specific reference to the copyright assigned as "said copyright being for the term of twenty-eight years";[11] the second assignment conveys "the copyright acquired . . . by public presentation of the motion picture photoplay," referring by definition only to the initial term of copyright. *Fred Fisher Music Co., Inc. v. M. Witmark and Sons*, 318 U.S. 643 (1943).[12]

10. *See, e.g., Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639 (2d Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968); *see also, Austin v. Steiner*, 207 F. Supp. 776 (N.D. Ill. 1962).

11. Petitioner omits reference to this language in its discussion of the legal effect of these assignments (Petition at 15-16).

12. Moreover, it is clear that the DWG Corp., as the assignee of the personal rights of Griffith, had no more than the initial term to convey. 522 F.2d at 747, n. 8.

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Thus, in the absence of any contrary evidence, the Court of Appeals was required to find that Petitioner acquired only rights to the initial term of copyright from the DWG Corp. 522 F.2d at 747.[13]

II.

PETITIONER'S CONTENTION THAT CERTIFICATES OF COPYRIGHT RENEWAL ARE ENTITLED TO *PRIMA FACIE* WEIGHT PRESENTS NO ISSUE FOR THIS COURT TO REVIEW ON CERTIORARI.

In its decision in the present case, the Court of Appeals stated that a certificate of copyright renewal is not entitled to the same *prima facie* evidentiary value afforded to certificates of initial-term copyright registration by 17 U.S.C. §209.[14] Although

13. The Court of Appeals properly applied the principle of law set forth in *Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518, *cert. denied*, 358 U.S. 831 (1958). Petitioner's contention that there was evidence from which an intention to transfer the renewal term could be reasonably inferred is based on irrelevant and incorrect assertions (Petition at 16-17). The fact that Griffith did not claim ownership of the motion picture copyright in 1937 reflects the fact that he did not own it in 1937: it was the property of Petitioner during the initial term of copyright. Certainly, evidence that after Griffith's death, attorney Loyd Wright (as executor) quitclaimed rights in THE BIRTH OF A NATION is hardly probative of Petitioner's right to the renewal term; moreover, contrary of Petitioner's suggestion (Petition at 18), it does not appear from the evidence that Wright had represented Griffith in connection with the making of the motion picture or with the two 1915 assignments from the DWG Corp. to Epoch and Dixon, which were executed and witnessed (respectively) by Albert Banzhaf, another Griffith legal advisor (JA 240A, E 14-18). And the absence of a renewal by Griffith personally in 1943 is no evidence of his intention to grant Petitioner the renewal term in 1915.

14. The Court of Appeals specifically corrected the decision in *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723 (S.D.N.Y. 1974), cited by Petitioner at 21. There, the validity of a renewal copyright was not contested, and the comment of the District Court was *obiter dictum*. 522 F.2d at 746, n. 6.

contested by Petitioner, this reasoning did not affect the outcome of the litigation: the Court also found that there was sufficient evidence at trial to rebut the evidentiary weight, if any, of Petitioner's renewal certificate, 522 F.2d at 746.[15]

In any event, however, the Court of Appeals' construction of 17 U.S.C. §209 was correct. The language of that section refers solely to certificates of initial-term registration,[16] and Copyright Office regulations and practices, to which Petitioner gives great weight (Petition at 19), offer further proof that a renewal certificate is not entitled to respect equal to that shown certificates of initial-term registration.[17]

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15. The Court of Appeals noted that material statements contained in Petitioner's renewal certificate, bearing on its claim to renewal, were false. 522 F.2d at 745. In particular, Petitioner named itself as "author" in the renewal application, although it was not in existence at the time of the motion picture's production.

16. As the Court of Appeals noted, certificates of copyright registration which are entitled to *prima facie* evidentiary value can be obtained only by completing mechanics of registration, including the deposit of copies of the work for which copyright registration is sought. 17 U.S.C. §209. Such mechanics, which serve to establish the authenticity of a claimant's entitlement to copyright, are a feature of initial-term registration only. Moreover, the section of the Copyright Act immediately preceding §209 makes it abundantly clear that the *prima facie* provision applies only to initial-term certificates. Under Section 209, the certificate which is entitled to *prima facie* weight is that obtained upon "entry" of the work in the record books of the Copyright Office: such "entry" is required "whenever deposit has been made in the copyright office of any work . . ." 17 U.S.C. §208. No deposit is required as a condition of obtaining a renewal certificate.

17. Petitioner's contention that the Copyright Office procedures for registering renewal claims are "comparable" (Petition at 21) with those for registering initial-term copyrights is untenable. *Compare* 37 C.F.R. §202.3(b) and 37 C.F.R. §202.17. *See also*, B. Ringer, "Renewal of Copyright," 107, 183 (General Revision of the Copyright Law, Study No. 31, 1960) [1 *Studies on Copyright* 503, 579 (Copyright Soc'y of U.S.A. 1963)]. That discretion which the Copyright Office has exercised in examining renewal applications, which was the subject of the Opinion of then Attorney General Saxbe, 183 U.S.P.Q. 624 (1974), cited by Petitioner (Petition at 19-22), is apparently limited to rejecting an application for renewal registration *which contains mutually exclusive contradictory statements on the face of the application.*

Weighing further against the need for review by this Court of the construction of 17 U.S.C. §209 adopted by the Court of Appeals is Petitioner's failure to suggest how that construction might operate to disadvantage any class of litigants or to interfere with the administration of the Copyright Act. As this case demonstrates, genuine disputes over entitlement to renewal-term copyright necessarily turn on evidence beyond the contents of any renewal certificate. See also, e.g., *Picture Music, Inc. v. Bourne*, 314 F. Supp. 640 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972). This lack of real significance attaching to the evidentiary value of renewal certificates generally, together with the obviously correct denial of weight to the faulty renewal certificate involved in the present case, precludes the need for review by this Court.

Conclusion

Petitioner has failed to demonstrate that either of the issues it seeks to have reviewed by this Court on certiorari raises questions of special significance which this Court should address. Moreover, Petitioner has failed to demonstrate that the Court of Appeals erred in any way in its decision. Therefore, its Petition for Certiorari must be denied.

Respectfully submitted,

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